***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

75-1226

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RICHARD ANGLADA,

Defendant-Appellant.

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# REPLY BRIEF FOR DEFENDANT-APPELLANT

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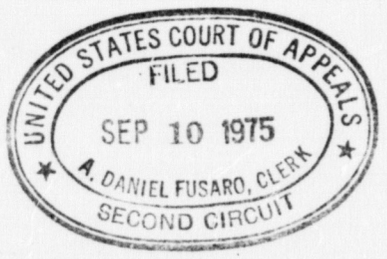
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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## REPLY BRIEF FOR DEFENDANT-APPELLANT

For his Reply, defendant wishes to respond to two of the points made in the Government's brief.

### Was There "Uncontradicted Proof" of Propensity?

The Government concedes (Br. 11) that the defendant has satisfied his burden of showing that the Government's agents induced the crime of which he has been found guilty. The only remaining question, then, is whether there was "uncontradicted proof" that defendant was "ready and willing without persuasion" or "awaiting any propitious opportunity"

to commit the offense. United States v. Riley, 363 F. 2d 955, 959 (2d Cir. 1966). If there was not, the defendant was entitled to an entrapment charge. In determining whether there was such "uncontradicted proof," the Court must credit the testimony most favorable to the defendant. United States v. Dehar, 388 F. 2d 430, 433 (2d Cir. 1968).

Assuming, then, the truth of the defendant's testimony on the propensity issue, we have the informant beseeching the defendant to "do me the favor" of "getting some drugs," "Will you do me the favor, please. I will come out winning at the end." (A8) Continuing, the informant pleaded further: "Please, Richie, I really would appreciate the favor, you know, you are my sister's boyfriend, I want you to help me." Nevertheless, the defendant continued t hesitate. The informant continued to press. Finally, the defendant said he "would let him know." (Id.) The informant's sales pitch took 45 minutes to an hour. (A9)

In United States v. Riley, supra, at 959, the Court held that the defendant's testimony required an entrapment charge. The Government's proof simply showed an introduction by an informant and defendant's sale to the undercover agent on two occasions, a week apart. The defendant's testimony was summarized by the Court as follows:

> Not disputing the transactions, Riley gave a wholly different version of their provenance. . . . The informant, known to Riley as "Charles," was a friend with whom he had often . . . "gotten high." . . . Hank, introduced as a friend of Charles from Brooklyn,

> said he and his wife were "sick," i.e., in need of a dose of narcotics, and sought Riley's help in getting some. When Riley protested that he was not a seller of narcotics, Hank inquired whether he didn't know where to get them, Riley responded that he would go out on the street and see what he could do. Hank's request for twenty-five bags, in contrast to his own daily purchases of only four or five, indicated to him that Hank was not only a user but also a seller, indeed Hank said he sold in Brooklyn and lacked a connection.

Riley received "five bags" from Hank as payment. Riley assisted Hank in the purchase of narcotics not merely on one occasion but on two. This Court held that the defendant had a right to have the jury decide which version of the facts it believed and, if it believed Riley, the entrapment defense was appropriate. Defendant here respectfully suggests that Riley's evidence on lack of propensity is weaker than his own.

Likewise, the evidence of lack of propensity in United States v. Cohen, 431 F. 2d 830 (2d Cir. 1970) is less strong than in the current case yet required an entrapment charge.

The Government makes much of the fact that, once convinced to assist the informant, the defendant proceeded expeditiously. So did Riley. This portion of the Government's argument is for the trier of fact, not the Court. To the extent that it factually implies a lack of propensity, the Government was free to so urge the jury. No case cited by the Government indicates that the hesitation that indicates a lack of propensity must continue throughout the

transaction. The defense of entrapment deals with the manner in which the crime is "created." United States v. Sherman, 200 F. 2d 880 (2d Cir. 1952).*

The Informant's Fifth Amendment Privilege

The Government contends that its own agent, who induced a crime, may nevertheless avoid testifying about the very facts of that inducement by asserting the Fifth Amendment privilege with regard to an alleged crime that occurred months after the inducement (Br. 15). This position makes the trial one-sided. It is wrong. Surely, the defendant is entitled to put in the best defense he can. In no way could proper questions on the issue of inducement and propensity have violated the informant's privilege.

The Government's contention that "it is more than conceivable" that the informant's testimony "would have" lead to inquiry which "in likelihood would have" established a link to other criminal activity (Br. 15) is sheer conjecture. And the Government's contention that defendant's counsel never submitted an offer of proof on what the informant would say is absurd considering the Government's own

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*The Government's contention that the defendant failed to establish the date of the inducement (Br. 7) is error. Defendant testified that it was the same day Torres had failed to show up, i.e., September 4. (Tr. 309)

admission that the informant refused to talk to the defendant's counsel (Br. 13).

The Government cites United States v. Llanes, 398 F. 2d 880, 884-5 (2d Cir. 1968) for the proposition that the lower Court properly upheld the informant's assertion of the privilege. The facts in Llanes are wholly different from those here. There, the informant "was himself under indictment for a narcotics violation which allegedly occurred at the same time and place as appellant's alleged violation, and, indeed, in the presence of the appellant. This then seems to be a classical situation for the full exercise of the privilege." (Emphasis added.)

Here, the State drug charge used to justify the assertion of the informant's privilege occurred months after the events on trial. There was no connection between the two crimes. There was instead a connection - indeed an identity - between what the Government had the informant do for it and what the defendant wanted to question the informant about. The Government's fantastic efforts to indicate that it was "more than conceivable" that testimony would have lead to "a link" between these two crimes is too hypothetical to justify keeping the informant off the stand, especially where the informant was in a central position to assist the defendant's entrapment position. The proper course was to rule on carefully phrased questions as they were propounded, not to exclude the informant even from testifying.

The Government (Br. 14) asserts that the informant "had no outstanding arrests" at the time of the alleged offense and says defendant is "completely in error" by saying otherwise (Id). The Government is wrong. Detective Drucker testified that the informant had an outstanding arrest in August 1974 (215), prior to the time of the alleged offense. So, United States v. Dehar (Defendant's Br. 21) is directly in point here. Furthermore, the informant's motive in assisting the authorities, whether, in the words of Dehar, he was trying to "work off a bust," could not even be explored absent his testimony.

The defendant was entitled to question the informant about the very crime the informant assisted the Government in inducing. The assertion of the privilege should not have been upheld. Cf. Roviaro v. United States, 353 U.S. 53 (1957). Although Roviaro and its progeny deal with a related but different issue, it also involved the defendant's interest in an informant's availability. In Roviaro, the counter-interest was the informant privilege. Here it is the Fifth Amendment privilege. In Roviaro, a blanket assertion of the privilege was rejected without an examination of the defendant's real needs. Here, the Court should have rejected a blanket assertion of the Fifth Amendment privilege in light of the centrality of the informant's testimony and ruled on individual questions as they were asked. Alternatively, where the Government refuses to grant an informant

immunity, though such a grant could not, as a practical matter, lead to the loss of a prosecution, the charge should be dismissed, just as the refusal to produce the informant in Roviaro would require dismissal.

Respectfully submitted,

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